

MAX S. CASTLE,

Appellant

Appearing for the Appellant:

Sam Zalman Gdanski
Attorney At Law
3 Rockwood Lane
Suffern, New York 10901

Appearing for the Government:

Timothy J. Binder
Office of the General Counsel
U. S. Department of Agriculture
1734 Federal Building
1220 S.W. Third Avenue
Portland, Oregon 97204

AGBCA No. 97-137-1

DECISION OF THE BOARD OF CONTRACT APPEALS

April 14, 2000

Before HOURY, POLLACK, and VERGILIO, Administrative Judges.

Opinion for the Board by Administrative Judge POLLACK, with separate concurring opinion by Administrative Judge VERGILIO.

POLLACK, Administrative Judge.

This appeal arises under Lease No. 57-0219-0-0009, for office space occupied by three agencies of the U. S. Department of Agriculture (USDA or Government) in Weiser, Idaho. The Farmers Home Administration (FmHA) terminated a 5-year lease awarded to Max S. Castle of Ontario, Oregon, (Appellant), before the lease had expired in September 1995. Appellant initially claimed \$87,259.45¹, which it described as the remodeling costs incurred in preparing and renovating the

¹ While the lease called for \$50,000 to \$55,000 for remodeling costs, Appellant ran into various difficulties during the remodeling, among which was underestimating the cost of material and having to change contractors to Bill Harp because of poor work by the initial contractor. (Transcript (Tr.) 16-17).

space in question. The Contracting Officer (CO) denied the claim in a decision issued February 24, 1997, on grounds that the lease specifically permitted termination upon 120 days written notice, which Appellant had received.

The Board has jurisdiction over this appeal under the Contract Disputes Act, as amended, 41 U.S.C. §§ 601-613. This matter has previously been the subject of a Motion for Summary Judgment by the Government, which the Board denied on August 25, 1997, Max Castle, AGBCA No. 97-137-1, 97-2 BCA ¶ 29,204. In denying the Motion, the Board concluded that there were material issues of disputed fact which needed to be resolved regarding whether various Government officials had made oral promises assuring Appellant of at least a 5-year lease.

Subsequent to the ruling on the Motion, Appellant has raised an additional issue charging that the Government entered into the contract, knowing that it had no intention to complete the full term of the lease.

As presented by Appellant, the issues in this appeal are that it is entitled to recoup its costs of remodeling because (1) the Government made representations to the Appellant that the Government would utilize the premises for 5 years and Appellant reasonably relied upon those representations to make improvements to the property; (2) the Government entered into the contract knowing that it did not intend to honor the full term and thereby operated in bad faith; and finally, (3) the determination to terminate was unreasonable and in bad faith, as it was not necessary.

FINDINGS OF FACT

1. On February 5, 1990, the Government issued a solicitation titled "Solicitation for Offers for the Small Lease Package." The solicitation specified that the "United States Department of Agriculture (USDA), Farmers Home Administration (FmHA), Soil Conservation Service, and Agricultural Stabilization and Conservation Service are interested in leasing space in Weiser, Idaho."² The lease identified the CO as Letty Percifield. It did not identify which of the three listed USDA agencies employed the contracting officer. However, the solicitation did state that "The lease is for five (5) years. FmHA may terminate the lease any time after occupancy on 120 days written notice to the lessor." The offers were to be submitted to the CO, Boise, Idaho. (Appeal File (AF) 32-34.)

2. Castle's initial proposal on the solicitation was dated March 30, 1990 (AF 43-44). Thereafter a meeting was held in Boise which was attended by Max Castle and at least the CO on this contract. Sometime after that meeting, Castle submitted a new proposal dated May 23, 1990. (AF 47-49.) On June 14, 1990, the parties held another meeting in Boise, which was again attended by Mr. Castle, as well as by the CO and Ms. Yvonne Rose, a contract specialist assisting Ms. Percifield. At the meeting the parties went through the various contract clauses, including a clause which gave the Government the right to terminate the lease on 120 days' notice. There is no evidence that either

² Soil Conservation Service (SCS), Agricultural Stabilization and Conservation Service (ASCS).

Government official made representations at that meeting guaranteeing a full 5 years on the lease nor was there any evidence that either made representations which indicated that the Government was waiving its rights to use the 120-day termination of lease clause. (Tr. 89-90.) More specifically, the CO, Ms. Percifield, testified that she neither made representations as to a firm lease nor any representation waiving the 120-day clause (Tr. 60). Mr. Castle basically confirmed the Government testimony as to the operation of the 120-day termination clause. He candidly stated at two different times during his testimony that because of the 120-day provision it did not make any difference to him at the time he signed the lease whether the lease was 5 years or 10 years. He also testified that he understood that the Government had the right to move out after 120 days. (Tr. 13-15, 35.)

3. On the same day of the meeting and after the parties reviewed the clauses, FmHA awarded Lease No. 57-0219-0-0009 to Appellant. The lease covered approximately 4,034 square feet of net usable office space in the Castle Building, Weiser, Idaho. It was to be occupied by the three previously referred to USDA agencies. The Government intended to take occupancy beginning October 1990 and the term of the 5-year lease ran through September 30, 1995. Annual rental was \$37,314.48, and was to be paid at the rate of \$3,109.54 per month. (AF 30-33.) Prior to entering into this lease, Castle had continuously leased the same building to USDA agencies since 1976. There had been several solicitations over that time period and Castle had remodeled the building on four different occasions. From 1976 to the date of the lease in dispute, the Government was the sole tenant of the facility. That was going to continue to be the case, under this lease. (Tr. 6-9.) When the CO awarded the lease, she had not heard anything nor did she have knowledge regarding a plan by ASCS, one of the tenants, not to honor the lease and to secure a new building (Tr. 70).

4. In addition to its specific terms, the contract incorporated all terms and conditions of proposals. In those proposals, the Appellant agreed to remodel the building at an estimated cost of \$50,000 to \$55,000. Work was to be completed by September 30, 1990, and included new carpeting, insulation, painting, lighting, paving a parking area, and landscaping. In addition the work included extending the size of the building (AF 30-31, 47-49; Tr. 26.) The building remained occupied during the remodeling (Tr. 9-10).

5. The lease was on General Services Administration Standard Form 2, entitled "U.S. Government Lease for Real Property." Paragraph 4 stated:

The Government may terminate this lease at any time by giving at least 120 days notice in writing to the Lessor and no rental shall accrue after the effective date of termination. Said notice shall be computed commencing with the day after the date of mailing.

6. In addition, paragraph A3 of the Solicitation for Offers for the Small Lease Package, had stated:

The lease is for five (5) years. FmHA may terminate this lease any time after occupancy on 120 days' written notice to the lessor.

(AF 32.)

7. In presenting his testimony, Mr. Castle clearly stated that he would not have entered into the lease if he believed it would not run full term. He acknowledged that he had nothing in writing from the Government which indicated that he could be assured of the full term. (Tr. 11-15.) Instead, he relied on his interpretation of conversations with Government representatives associated with the contract. In that regard, he explained that in the days leading up to signing the lease, it did not seem feasible or prudent for him to put \$50,000 to \$55,000 into remodeling the building, given that it was located in an out-of-the-way location and in the wrong district of Weiser. Mr. Castle went on to explain, however, “it seemed like-- they³ assured me, just from talk, that if I made them happy, they would stay.” (Tr. 12.) In further explanation of his actions, he said, “And I just – from talking to everybody, I just took it that if I was going to go in there and spend \$50,000 to \$55,000 that there would be a good chance of my recovering my money.” (Tr. 13.) Finally, reaching for more support for his contention that he reasonably relied on the Government, he referenced a conversation with Mr. Nick Partin, county supervisor for FmHA in Weiser, who commented to Mr. Castle during the remodeling work that Castle was “fixing it real nice” and said, “keep up the good work, and we’ll probably be here for a long time.” Mr. Castle acknowledged, however, that Mr. Partin did not promise him USDA was going to stay there. (Tr. 15.) Also, this conversation, clearly took place after the award.

8. After signing the lease, Castle embarked on remodeling. Toward the end of the remodeling work, Mr. Ray Laan, the County Executive Director for ASCS, one of the Government tenants, approached Castle’s construction contractor. Mr. Laan discussed the possibility of that contractor contracting to construct another building for the Government, ostensibly to replace the building being remodeled. At the time, most but not all of the remodeling work had been completed; however, occupancy under this lease had not started. (Tr. 50-55.) Mr. Laan had no express contracting authority on the lease, as the contracting function was held by officials of FmHA. (Tr. 130.) Castle’s contractor almost immediately told Mr. Castle of the conversation with Mr. Laan (Tr. 20-21, 51-52). Mr. Castle stated that he was upset over the conversation as it affected the potential length of the lease which he had just signed and how this affected his recouping of the remodeling costs (Tr. 45-46).

9. Soon after having the conversation with his contractor, Mr. Castle said that he related the conversation between his contractor and Mr. Laan to Nick Partin, the FmHA county official. Mr. Partin had no delegated contract authority on the project; however, he was located in Weiser and was

³ Ms. Percifield and Ms. Rose. (Tr. 12-13.)

the FmHA official with whom Mr. Castle had generally interacted on day-to-day lease matters during the prior leases, who Mr. Castle interacted with during this remodeling and from Mr. Castle's perspective was the person calling the shots during the renovation. (Tr. 40, 118-129, 130-131.) According to Mr. Castle, Mr. Partin sympathized with him regarding Mr. Laan's comments. There was no evidence that Mr. Castle carried the matter any further with either Mr. Partin or with the contracting officials with whom he had signed the lease in Boise. (Tr. 122.) Mr. Partin testified that he did not have any conversations with Mr. Laan about Mr. Laan wanting new space during the time period after award (of June 14, 1990) and the completion of remodeling (Tr. 87). Further, to the best of Mr. Castle's recollection, the above-referenced statements of Mr. Laan regarding a new building were the only instance that Mr. Castle knew of or was aware of, where any Government employee expressing an interest in a new building, prior to later events toward the end of 1992 (Tr. 29, 45-46).

10. Again, referring to the statements of Mr. Laan, regarding ASCS wanting a new building at the time this lease was entered into, Ms. Percifield, the CO at the time of award, testified that even if Mr. Laan had asked her for more space during the remodeling in 1990, she "would have told him he just couldn't have it, that's all we were allowed at that point." (Tr. 81.) Ms. Rose, who succeeded as CO toward the end of the lease and who was the CO at the time of the termination, stated in her testimony that FmHA did hold a meeting at the site at some point during the remodeling and before occupancy, which was attended by the various tenants. To the best of her recollection the only matters complained of by ASCS at that pre-occupancy meeting was some concerns about the appearance of the exterior of the building. Thereafter, the remodeling was completed and the Government took occupancy in October 1990. (Tr. 103.)

11. After occupancy, the lease remained in effect for approximately 30 months before the Government took any actions as to ending the lease (AF 28). It is undisputed that some time during the later part of 1992, the Government engaged in a reorganization of offices and placement of USDA workers. As a result of the reorganization, the number of workers who would be needed in Weiser increased. Specifically, ASCS was adding one worker. In addition, the FmHA office in Payette, Idaho, was being closed (processing on that starting in December 1992) and three workers from that office were being moved to the Weiser offices. These changes caused the Government to begin to look at the possibility of securing different space, and ultimately those considerations culminated in the Government concluding that it would need more space. With the additional people, it was too crowded and USDA space standards allowed more space. For FmHA alone, six people were now occupying space that had been used by three. With the new personnel, there was not adequate room for files and the office did not comply with handicapped requirements. (Tr. 22, 78, 87, 93-94, 98.) While Appellant alleged in its claim that Mr. Castle was told that the reason for the termination was because ASCS was hiring "one more person", when questioned on that conversation, Mr. Castle acknowledged that maybe he heard the Government official wrong and he may not have fully remembered the conversation. (Tr. 22.)

12. As a consequence of the reorganization, the Government decided to go out with a new solicitation for space and terminated the present lease. On April 9, 1993, the CO notified Appellant in writing that in accordance with its terms, the lease for the Castle Building would be terminated

on August 8, 1993, and the space vacated on or before that date. (AF 28; Tr. 92-93.) Government officials were not sure about how soon prior to April 9 they knew of the plan for terminating; however, thought that it would have been 3 or 4 months, which is consistent with the late 1992 reorganization. At about that same time frame, the Government decided to transfer the contracting responsibility for a new lease to ASCS rather than leave it with FmHA. This was due to various budget matters and also the size of the respective operations of the agencies. Thus, all contract actions regarding securing a new lease were handled by ASCS officials. The termination of the existing lease, however, was handled solely by FmHA. (Tr. 94-95, 106-108.)

13. According to Ms. Rose, the FmHA CO at the time of termination, Mr. Laan's desire for new space, to the extent expressed in 1990 during the remodeling, did not play a role in the decision to terminate. There was no pressure from agency personnel to terminate the lease. The decision to terminate was based on the need for more space because of the added workers. (Tr. 91-92.)

14. By letter of May 13, 1996, addressed to the Board, the Appellant submitted a certified claim. It then filed with the Board an essentially identical letter dated July 2, 1996. The letter stated in part:

Please consider this a claim under the Contract Disputes Act in the amount of \$87,259.45. The balance of the thirty-eight months,⁴ which is pending on a five year lease which was terminated improperly, is over and above the amount of the remodeling incurred and sustained as losses as a result of the government's actions in terminating the lease improperly. . . .

15. After a period of procedural confusion, the Appellant finally submitted a claim to the CO, which the CO denied by decision dated February 24, 1997. In the decision, the CO quoted paragraph 4 of the lease and stated that the Government had obligated itself to no more than a 120-day term (AF 22-29, 15-18, 21, 92.) The appeal was docketed as AGBCA No. 97-137-1. Thereafter the Government filed a Motion for Summary Judgment which was denied. The matter then proceeded on its merits.

16. In its Complaint, Appellant has alleged that the termination was arbitrary, capricious, and in bad faith because Castle had been told that the sole reason for the cancellation of the lease was that one additional employee was going to be rehired and therefore the premises were no longer suitable. Later, when defending against the Government's Motion for Summary Judgment, Appellant alleged that three Government officials assured him of either a 5- or 10-year lease if remodeling were done to their specifications. Finally, at trial, Appellant contended that the termination was a result of ASCS's desire for a new building and the Government knew at the time it entered the lease and during the contractor's remodeling, of Government plans and intentions not to honor the full term of the lease.

⁴ The lease was actually in effect for slightly more than 34 months, from October 1, 1990, until August 8, 1993. The balance of its 5-year, or 60-month term, would therefore have been only 26 months.

DISCUSSION

The termination of lease clause in this contract is clear. Under it the Government, as a matter of right, may terminate the lease, as long as the Government provides the lessor the requisite number of days of written notice. (Findings of Fact (FF) 2, 6.) The enforcement of a provision, similar to that in this lease, has been upheld by this Board in a number of cases. See Darrell Stebbins, AGBCA No. 91-164-1, 93-1 BCA ¶ 25,236; Paul F. Senteney, AGBCA No. 92-131-1, 92-3 BCA ¶ 25,068; and Capricorn Enterprises, AGBCA No. 89-125-1, 90-1 BCA ¶ 22,587.

Appellant does not contest the basic right of the Government to terminate the lease. Mr. Castle, in his testimony, acknowledged that he was aware of the clause and its potential operation. (FF 2.)

In this appeal the Appellant seeks to recover costs it expended in remodeling the property in reliance on what it claims were Government representations which led it to believe that the lease would run the full 5-year term. Appellant charges that had it known otherwise, it would not have committed the costs it did to the remodeling. (FF 4.) Additionally, Appellant seeks to recover its costs of remodeling on the basis that it was misled into entering into the lease, in that it alleges that the Government knew at the time of the remodeling and possibly before, that it would not honor the full 5-year lease, would be proceeding at some point with constructing a new building and would thereby terminate this lease prematurely. This latter position rests on comments made by Mr. Laan of ASCS during the remodeling. (FF 8, 9.)

Finally, Appellant charges that the lease did not have to be terminated as ASCS, one of the Government agencies in the building added only one person to its workforce, that was not a fair basis to terminate, and thus the Government acted in bad faith (FF 11).

The evidence does not support a finding of liability on the basis of a Government official misleading Appellant as to the length of the lease or misleading Appellant as to the operation of the 120-day clause. The Government produced at hearing three witnesses, who testified that he/she did not make any such representation. Further, Appellant's evidence was at most an optimistic interpretation of conversations and Appellant presented no specific evidence or testimony where any Government official made any commitment beyond what was set forth in the language of the lease. Finally, it was clear from Appellant's testimony that Appellant was familiar with the 120-day clause and the potential risks inherent in signing a contract with that clause. (FF 2, 4, 6.) Moreover, Appellant has not attempted to demonstrate how reliance on oral conversations could be reasonable in light of language of the termination clause.

To justify entitlement to compensation on the basis of misleading representations, Appellant had to identify specific actions and statements of Government officials which were inconsistent and in conflict with the terms of the lease. Appellant would further have to show that the actions and words were those of an authorized Government official, who had the authority to bind the contracting agency. Then, Appellant would also have to show that it reasonably relied on those actions or representations when it entered into the contract. See Advanced Materials v. Perry, 108 F. 3d 307,

311-312 (Fed. Cir. 1997). Finally, Appellant would still have had to explain how it interpreted such actions or representations, in light of the contract specification allowing termination with 120 days' notice. Appellant has failed to establish any of these points. In contrast, the affirmative evidence of the Government is that no such representations were made. (FF 2.)

As to the argument regarding the Government entering into the contract with an intent to not perform, that if proven could constitute a legal basis for relief. There are few checks on the Government's right to terminate, when the contract contains a clause which gives the Government such a right. While the case law dealing with restrictions on termination arises out of the standard FAR termination for convenience clause, the legal principles apply equally as well here. The restraints on termination for convenience are (1) where the termination was motivated by bad faith, (2) the contracting officer abused his/her discretion in terminating, or (3) the Government entered into the contract with no intention of allowing it to be completed. Under those circumstances a termination for convenience can constitute a breach. That said however, the Court has also made it clear that the contractor has the burden of proof and the burden is "very weighty." Krygoski Construction Co. v. United States, 94 F.3d 1537 (Fed. Cir. 1996), cert. denied, 117 S. Ct. 691 (1997).

Here, there has been no showing of bad faith or abuse of discretion by the contracting officer or any other official. We do have evidence that the ASCS representative made comments during the renovation period which did show that he wanted to secure another building, however, at the time the lease was entered into, Mr. Laan was a customer and not a contracting official on this lease. (FF 8, 9.) There is no evidence that the CO entered the lease with the intention of not honoring it. Rather, she pointed out that at the time she awarded the lease she had no knowledge that ASCS wanted another building and further, even had ASCS come to her at the outset of the lease she would have denied it more space, because more was not allowed (justified). (FF 2, 3, 9, 10, 11.)

Appellant has presented no evidence to make us doubt her truthfulness. Moreover, there is no evidence that the contracting officials were even aware that Mr. Laan was hoping to secure different space before the end of the lease. Ms. Rose noted that at the pre-occupancy meeting, the only complaint from ASCS involved the exterior and clearly there was no indication then or prior that Ms. Percifield or Ms. Rose had any knowledge of a plan by Mr. Laan. (FF 3, 9, 10.)

The termination was undertaken as a reaction to a reorganization of the various Agriculture offices. That reorganization involved more than simply ASCS adding a number of workers to the Government staff. As a result of the reorganization, the Government needed more space. What had once been space for three FmHA employees was now occupied by six and requirements such as handicapped compliance were not being met. (FF 11-13.)

While Appellant has attempted to lead us to the conclusion that the decision to terminate had been in the works from the start of the solicitation or at least during remodeling and that the termination was the culmination of that earlier plan, Appellant's position is founded on speculation and conjecture and as such does not rise to evidence on which we could or would conclude that the Government acted improperly. All evidence points to the facts that the Government terminated

because it needed more space. What the Government did here is simply follow what the contract allowed. (FF 2, 6, 7.)

Finally, we also find no factual or legal merit in Appellant's claim that the lease was improperly terminated because of the hiring of one additional person at ASCS. The evidence from the Government was clear that a number of individuals were added to the staff at the Weiser facility and Appellant, in his testimony, even conceded that he may have misinterpreted the conversation on which he relied. (FF 11.)

The Appellant entered into a contract which contained a 120-day termination clause. With such a clause, the Appellant assumed the risk that conditions could arise to end the lease well before its term. Mr. Castle is adamant in asserting that had he known the lease would not run full term he would not have entered into the lease. However, his decision was his own and the Government officials responsible for the contract cannot be held responsible for his optimistic conclusions. The Government acted within its rights on the contract and we will not rewrite the agreement. Accordingly, the appeal is denied.

DECISION

The appeal is denied.

HOWARD A. POLLACK
Administrative Judge

I Concur:

EDWARD HOURY
Administrative Judge

VERGILIO, Administrative Judge, concurring separately.

I concur separately because the majority gives more credence than I deem appropriate to a meritless, ill-premised claim. At this stage, with a fully-developed record, the contractor has presented no credible evidence to support its allegation of an arbitrary, capricious, or bad faith termination, or of Government improprieties when entering into the contract. Further, the contractor has not explained why it is entitled to its remodeling and construction costs (which were not to be separately compensated) in addition to the rent it received pursuant to the contract.

The material facts are few. The parties entered into a lease which required the contractor to remodel and do construction prior to the rental period (Appeal File (AF) at 32-85). The solicitation and contract expressly permitted the Government to terminate the 5-year lease with advance notice of 120 days; after the 120 days, the Government's obligation to pay rent ceased (AF at 30 (¶ 4), 32 (¶ A3)). The contractor was aware of the termination provision before entering into the contract (Transcript at 13). The Government terminated the lease and ceased payment under the lease pursuant to the provision. The contractor recognized under oath that no one in the Government guaranteed the contractor that the Government would not exercise its right to terminate or falsely induced the contractor into the lease (Transcript at 13-15). Changed conditions led the Government to terminate the lease and move elsewhere.

The record does not support a conclusion that the Government's termination was made in bad faith or was arbitrary or capricious. The record does not suggest that the Government entered into the lease knowing or expecting that it would be terminated. Therefore, I deny the appeal.

JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D. C.
April 14, 2000.